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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS AT AUSTIN

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COURT OF CRIMINAL APPEALS
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KARL DEAN STAHMANN, Appellant
v.
THE STATE OF TEXAS, Appellee

13-16-00400-CR
In the Thirteenth Court of Appeals
Edinburg, Texas

Appealed from the 207th Judicial District Court
Cause No. CR2013-409
Comal County, Texas

STATE'S BRIEF ON THE MERITS

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Oral Argument Has Been Granted

Identity of Judge, Parties and Counsel

Judge

The Honorable R. Bruce Boyer, 22nd Judicial District Court of Comal County

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Statement of the Case

The issue in this case relates to one count of Tampering with Physical Evidence based on Appellant throwing a bottle of prescription medication over a game fence following a car accident. Third-party witnesses observed Appellant's actions and informed law enforcement after officers arrived. The jury convicted Appellant of Tampering with Physical Evidence.[1] Relying on the reasoning of *Thorton v. State*[2] and *Villarreal v. State*,[3] the Court of Appeals found the evidence insufficient that Appellant *concealed* the evidence because third-party civilian witnesses observed Appellant's actions, maintained a visual of the evidence, and officers were able to see the evidence *after* it was pointed out to them on scene.[4] The Court of Appeals determined that the evidence was insufficient to support the jury's verdict on the alternative theory that Appellant's throwing the pill bottle over the fence caused an alteration or change to the bottle itself.[5] The Court of Appeals remanded the case to the trial court to enter a judgment of conviction for *Attempted* Tampering with Physical Evidence.[6]

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[1] *See Stahmann v. State*, 548 S.W.3d 46, 53 (Tex. App.—Corpus Christi Jan. 4, 2018, pet. granted).
[2] 401 S.W.3d 395, 398 (Tex. App. – Amarillo 2013), *rev'd on other grounds*, 425 S.W.3d 289 (Tex. Crim. App. 2014).
[3] No. 13-15-00014-CR, 2016 Tex. App. LEXIS 13061 at *5 (Tex. App.—Corpus Christi Dec. 8, 2016, no pet.)(mem. op., not designated for publication).
[4] *Id*. at 56.
[5] *Stahmann*, 548 S.W.3d at 54-55.
[6] *Id*. at 61.

Statement of Procedural History

On appeal, the parties submitted briefs addressing seventeen points of error. The parties' request for oral argument was denied and the case was set for submission on briefs. The Court of Appeals found the evidence legally insufficient to support Appellant's conviction for Tampering with Physical Evidence and remanded the case to the trial court to reform the judgment to Attempted Tampering. The State was granted an extension and timely submitted motions for rehearing and en banc reconsideration on February 2, 2018. The State's Motion for Rehearing and Motion for Reconsideration En Banc presented the State's arguments regarding 'alteration' based on Appellant's changing the physical location of the evidence. The Court of Appeals requested Appellant file a response. Appellant filed a response on March 15, 2018. On May 4, 2018, the State's motions were denied, with Justice Benavides dissenting from the denial of the Motion for Reconsideration En Banc.

Questions Presented for Review

1. Where this Court and other appellate courts have found evidence sufficient to support an 'alteration' under the tampering statute when an item's physical or geographical location is changed, did *Stahmann* err in failing to uphold Appellant's tampering conviction based on his undisputed 'alteration' of the pill bottle's location by throwing it away from himself and the crash site, over a fence, and into a patch of shrubbery?[7]

2. Where the "dispositive inquiry is whether law enforcement noticed the object before the defendant tried to hide it and maintained visual contact" of the object, and law enforcement only learned of the existence and location of the evidence from a third-party witness well after Appellant threw it away, did Appellant "conceal" the pill bottle?[8]

[7] *See, e.g.*, IX R.R. at 119-121, 134-135, 169-170; *see also* XI R.R. at 24-25, 30-31; State's Motions for Rehearing and En Banc Reconsideration.
[8] *See, e.g.*, IX R.R. at 117-19, 121-23, 134-35, 137-38, 171, 173, 195.

Statement of Facts

This case arises from an automobile accident that occurred on July 1, 2012, on State Highway 46 at the intersection of Heritage Oaks Road (IX R.R. at 80-81). A van driven by Appellant Karl Stahmann turned in front of an SUV without signaling and caused a severe crash that led to fire erupting inside the SUV (*id.* at 116-17, 212-13, 235; XIII R.R. at 180-196—State's Photo Exhibits 1-9). An adult male, adult female passenger, and a young boy were in the SUV (*see* IX R.R. at 114, 166). The occupants of the SUV were injured, but managed to escape (*id.*). Appellant sustained an injury to his head (*id.* at 84-85). The front passenger in Appellant's van was rendered unconscious (*id.* at 116).

Ronnie Ballard and Michael Freeman, passersby driving on the road, observed the scene and stopped to render aid (*id.* at 113). As Mr. Ballard and Mr. Freeman approached the vehicles they called 9-1-1 (*id.* at 127). Mr. Ballard approached Appellant and saw that he was agitated, cursing, and bleeding from his forehead (*id.* at 117-18). Several open beer cans fell out of the vehicle as Appellant exited his van (*id.* at 119-20). Appellant stated that he wanted to call his father and began walking around the scene (*id.* at 117-18). Appellant was "very agitated," "very upset," and "angry" (*id.* at 118-19). Appellant kept asking to leave the scene, telling Mr. Ballard that Appellant's father lived up the street (*id.* at 119). After Mr. Ballard called 9-1-1, Appellant walked toward a high game-fence approximately 8-10 feet from where

the accident occurred (*id*. at 134-35). Appellant took a prescription bottle from his right pocket and threw it over the fence—10-15 feet across the fence line—into a patch of shrubbery near a tree (*id.* at 117-18, 121, 134-35). The area was in the direction of where his father lived, on the "property-side" of the fence beyond a "big iron gate" (*id*. at 161, 174). His behavior seemed very "odd" (*id*. at 156).

Mr. Ballard walked toward the fence to get a better look at where the bottle landed, and Appellant became angry and started yelling, asking him "what [he] was doing over there" (*id*. 118-19, 195). Appellant was in a hurry to leave the scene and appeared "very aware" of his surroundings and what he was doing, but remained at the location to obtain medical aid (*id*. at 119-21, 123). Mr. Freeman also observed Appellant throw the pill bottle over the fence (*id*. at 169-70). He stated that Appellant "got real nervous and started questioning us, why we were over there and what were we looking for" (*id*. at 171).

Deputy Chris Koepp with the Comal County Sherriff's Office responded to the scene of the accident (*id*. at 304-05). When Koepp arrived, he immediately checked out with dispatch and began to evaluate the scene (*id*. at 305). Koepp assessed who still needed treatment, handed out one of his SWAT vests and a medic pouch to a male being treated, and made contact with several people, including fire and EMS responders (*id*.). One of the individuals Koepp spoke to was Mr. Ballard (*see id*. at 122-23; 136-37; 307-08). Mr. Ballard informed Koepp that he had seen

Appellant throw a pill bottle over the fence (*id*. at 122-23, 137-38, 173). Officers gained access to and searched the area, locating the bottle in the area described by Mr. Ballard and Mr. Freeman (*id*. at 143-44, 180). Between the time Mr. Ballard observed Appellant throw the bottle and the time officers retrieved it, no person interfered with the area (*id*. at 156). The bottle was found three to five yards inside the fenced area and contained four white pills and several broken ones (*id*. at 308, 315). The name *George Castaneda* was printed on the front label of the bottle (*id*. at 315). The label also identified the pills as being promethazine, and warned that "federal law [prohibited] the transfer of [the] prescription to anyone other than the patient for whom it was prescribed" (X R.R. at 88, 89-90).

Subsequent testing of the substance confirmed that the pills were promethazine, and testimony was given at trial that the substance was classified in Texas as a dangerous drug (*id*. at 92-94). The officer who discovered the bottle stated that it had been "concealed" when he recovered it (IX R.R. at 328). At the time, officers were investigating the scene for possible assault, aggravated assault, and various alcohol and traffic offenses in relation to the crash (*id*. at 329, 331).

Standard of Review

Under the legal sufficiency standard of review, the reviewing court is not to determine "whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt," but whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[1]

In some cases, "a sufficiency-of-the-evidence issue turns on the meaning of the statute under which the defendant has been prosecuted."[2] "[A]ppellate construction of a statute may be necessary to resolve an eviden[tiary] sufficiency complaint when alternative statutory interpretations would yield dissimilar outcomes."[3] An appellate court must assess "whether certain conduct actually constitute[s] an offense under the statute with which the defendant has been charged."[4] Appellate construction of a statute establishes "what the evidence must show," thus enabling the reviewing court to "assess whether the evidence is sufficient to show it."[5] The question of statutory construction is a question of law, which is reviewed *de novo*.[6]

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[1] *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).
[2] *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015).
[3] *Moore v. State*, 371 S.W.3d 221, 227 (Tex. Crim. App. 2012).
[4] *Liverman*, 470 S.W.3d at 836.
[5] *Id.*
[6] *Id.*

A Straightforward Analysis of Section 37.09 Demonstrates Appellant "Altered" Or "Concealed" Evidence in Violation of the Statute.

1. The legislative purpose, plain language, precedent, and policy demonstrate that "altering" includes changing the physical or geographic location of evidence.

Summary of the Argument

The term "alter" in Section 37.09 of the Texas Penal Code includes physically moving or changing the location of evidence. Courts—including this Court—have applied this plain meaning interpretation of the term "alter" in recent cases and found a change in the physical or geographic location of evidence constitutes tampering with evidence. This interpretation is consistent with the purpose of Section 37.09, to preserve the honesty, integrity, and reliability of the justice system.

a) The Legislature's purpose and the plain language of the statute demonstrate that "altering" includes changing the physical or geographic location of the evidence.

When interpreting a statute, courts "seek to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation."[7] As Judge Learned Hand once advised, statutes "should be construed not as theorems of Euclid, but with some imagination of the purposes which lie behind them."[8] Notably, in *Wilson v. State*, this Court observed:

The purpose of section 37.09 is to maintain the honesty, integrity, and

[7] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).
[8] *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914).

> reliability of the justice system and [prohibit] *anyone*—including members of the government—from creating, destroying, forging, altering, or otherwise tampering with evidence that may be used in an official investigation or judicial proceeding.[9]

The first step to determine the "collective legislative intent or purpose, necessarily focus[es]…on the literal text of the statute in question and attempt[s] to discern the fair, objective meaning of that text at the time of its enactment."[10] The "literal text" is the only "definitive evidence" of what the legislators contemplated when enacting the statute.[11] When a statute is "clear and unambiguous, the Legislature must be understood to mean what it has expressed" and courts give effect to the "plain meaning" of the statute.[12] Words and phrases are construed under the rules of grammar and common usage unless they have acquired technical or particular meaning.[13] It is presumed that the entire statute is intended to be effective.[14] Thus, "[a] statute should be read as a whole in determining the meaning of particular provisions."[15] The relevant inquiry in the instant case is whether Appellant "altered" evidence in violation of Section 37.09 of the Texas Penal Code.[16]

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[9] 311 S.W.3d 452, 460 (Tex. Crim. App. 2010)(emphasis in original).
[10] *Boykin*, 818 S.W.2d at 785.
[11] *Id*.
[12] *Id*.
[13] *Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014).
[14] Tex. Gov't Code § 311.021(2).
[15] *Ritz v. State*, 533 S.W.3d 302, 311 (Tex. Crim. App. 2017) (Keller, P.J., and Walker, J., dissenting) (citing, *e.g.*, *State v. Rosenbaum*, 818 S.W.2d 398, 402 (Tex. Crim. App. 1991)).
[16] The relevant subsections provide:

There is no statutory definition for the term "alter." "Alter" is commonly understood to mean "to make different without changing into something else."[17] Alter is a verb, also defined as to "change in character or composition, typically in a comparatively small but significant way."[18] Thus, applying the common understanding of the term "alter" demonstrates that "alter" encompasses a change in the character of the evidence or a change that makes the evidence different. Changing the physical or geographic location of evidence changes the character of the evidence and makes the evidence different.

Section 37.09 provides that a person commits an offense if "knowing that an investigation or official proceeding is pending or in progress," he "alters" a thing "with intent to impair" its availability for or affect the course of "the investigation or official proceeding." Reading the term "alter" in context,[19] the Legislature's

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> (a) A person commits an offense if knowing that an investigation or official proceeding is pending or in progress, he:
>
> > (1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or
> >
> > ….
>
> (d) A person commits an offense if the person:
>
> > (1) knowing that an offense has been committed, alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense
> >
> > ….

Tex. Penal Code § 37.09.

[17] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th Ed. 2012).

[18] *Alter*, OXFORD ENGLISH DICTIONARY, https://en.oxforddictionaries.com/definition/alter (last visited Nov. 8, 2018).

[19] *See* Tex. Gov't Code § 311.011(a); § 311.021(2); § 311.023(1); *Ritz*, 533 S.W.3d at 311 ("A

intent was to prevent items in a criminal investigation from losing their evidentiary significance.

An offender changing the location of evidence may render a piece of evidence that was relevant to an investigation seemingly irrelevant. Similarly, the significance of a piece of evidence may be undermined when an offender changes the location of the evidence. The plain meaning of the term 'alter' indicates a change in the geographic or physical location of evidence 'alters' the evidence.

b) Courts have found the term "alter" includes moving or changing the location of evidence.

Recent opinions by the courts of appeals and one opinion by this Court interpret "alter" in the context of a tampering prosecution to include moving or changing the physical or geographic location of evidence.[20] Notably, in one of these cases—*Carnley*—both the state and the appellant apparently agreed that the evidence

statute should be read as a whole in determining the meaning of particular provisions….").

[20] *Burks v. State*, PD-0992-15, 2016 Tex. Crim. App. Unpub. LEXIS 1127, at *20 (Tex. Crim. App. Nov. 2, 2016)(not designated for publication), reh'g granted (Feb. 1, 2017), on reh'g, PD-0992-15, 2017 Tex. Crim. App. Unpub. LEXIS 471 (Tex. Crim. App. June 28, 2017), reh'g denied (Sept. 27, 2017)(Unpublished Court of Criminal Appeals opinions are technically not supposed to be cited as authority. Tex. R. App. P. 77.3; *but see Anastasoff v. United States*, 223 F.3d 898, 899–900 (8th Cir. 2000) (finding a similar rule unconstitutional), *opinion vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000)); *see also Carnley v. State*, 366 S.W.3d 830, 834-835 (Tex. App.—Fort Worth 2012, pet. ref'd); *Ramos v. State*, 351 S.W.3d 913, 915 (Tex. App.—Amarillo 2011, pet. ref'd); *Martinez v. State*, No. 05-17-00817-CR, 2018 Tex. App. LEXIS 3893, at *7 (Tex. App.—Dallas May 30, 2018, pet. ref'd) (not designated for publication).

was "altered" because the appellant moved it.[21] It is not required that evidence be damaged or that its evidentiary value be diminished for it to be considered "altered."

The appellants in *Ramos* and *Burks* challenged their convictions for tampering, claiming that moving evidence *in and of itself* did not amount to altering evidence under the tampering statute. The *Ramos* court interpreted the term "alter" to mean "to change or make different" and applied that plain meaning to "the act of physically manipulating potential evidence of a crime."[22] *Ramos* noted that due to the appellant's actions, the evidence "was no longer in the identical position (geographically and physically) in which it would have been had he not moved it," he therefore altered the evidence.[23] In *Burks*, this Court rejected an appellant's request to overrule *Ramos* and *Carnley* and instead explicitly stated it "agree[d] with the reasoning in *Ramos* and *Carnley*."[24] Finally, relying on *Burks*, *Carnley*, and

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[21] *Carnley*, 366 S.W.3d at 834-835.
[22] *Ramos*, 351 S.W.3d at 915.
[23] *Id*. at 914.
[24] *Burks*, 2016 Tex. Crim. App. Unpub. LEXIS 1127 at *19-20. *Burks* noted that the body in *Ramos* "'was no longer in the identical position (geographically and physically) in which it would have been.'" *Id*. at *19 (citing 351 S.W.3d at 914). The Court also agreed with the holding in *Carnley* "that there was sufficient evidence the appellant intentionally altered the evidence—a car—because she moved it." *Id.* at *19-20 (citing 366 S.W.3d at 835). *Burks* was later vacated due to an issue with preservation. *Burks v. State*, 2017 Tex. Crim. App. Unpub. LEXIS 471, at *2 (Tex. Crim. App. June 28, 2017)(not designated for publication). The original court of appeals' opinion was affirmed which found *either* act – moving the body or altering the physical state of the body – was "sufficient to support the jury's verdict" for tampering:

> To the extent appellant argues the evidence is insufficient to prove he altered … a corpse, the record contains sufficient evidence to support the jury's verdict. For example, the jury heard evidence that *appellant moved the complainant's body, an act that altered the body's location*. *See* [*Carnley*, 366 S.W.3d at 836]; [*Ramos*, 351

Ramos, the court in *Martinez* recently found the evidence sufficient to support the appellant's tampering conviction related to the mere 'alteration' of a body's location.[25] Several courts, including this Court, have already determined that "alter" includes changing the physical or geographic location of evidence.[26]

c) Interpreting the term "alter" to require more than a change in location or geography leads to results which are contrary to legislative intent.

Appellant's actions illustrate the Legislature's apparent purpose in creating the offense of tampering with physical evidence. Removing evidence from a crime scene and the notice of law enforcement has the potential to undermine the investigation, alter the charges that are ultimately brought against the defendant, and erode the pursuit of justice.[27]

S.W.3d at 914-15] (holding evidence sufficient to support conviction for tampering with evidence where the record contained evidence the defendant dragged a body). The jury ***also*** *heard evidence that appellant's actions altered the physical state of the complainant's body*. *See Carnley*, 366 S.W.3d at 836; *Ramos*, 351 S.W.3d at 914-15.

Burks v. State, No. 14-14-00166-CR, 2015 Tex. App. LEXIS 7470, at *4, n.1 (Tex. App. – Houston [14th Dist.] July 21, 2015)(not designated for publication)(emphasis added).

[25] 2018 Tex. App. LEXIS 3893 at *7-8.

[26] Notably, the fact that the legislature has permitted §37.09 to remain unchanged since the courts have construed "alter" in *Ramos*, *Carnley*, and *Burks*, is some indication the legislature approves of the construction given. *See State v. Colyandro*, 233 S.W.3d 870, 878 (Tex. Crim. App. 2007); *see also* 53 Tex.Jur.2d Statutes § 127, p. 190 ("When a statute has been construed, especially by a court of final resort, the fact the legislature permits it to stand through one or more subsequent sessions, without amendment, may be regarded as legislative sanction of that construction…").

[27] *See Haywood v. State*, 344 S.W.3d 454, 466 (Tex. App.—Dallas 2011, pet. ref'd).

Private citizens and law enforcement alike have been prosecuted under Section 37.09 for offenses such as tampering with narcotics, altering crime scenes, falsely labeling evidence, and more. The following hypothetical illustrates why this Court should apply the *Burks*, *Carnley*, and *Ramos* construction of the term "alter." Consider a scenario wherein a senior and rookie detective execute a search warrant on the home of a high-level narcotics trafficker.[28] The senior detective knocks on the door, believes he hears gunshots inside and kicks down the door, while the rookie detective immediately begins shooting as he enters the front room. The rookie detective fires a fatal shot at the drug-dealer. Both detectives realize the drug-dealer was not firing a weapon; rather he was playing a first-person shooter video game. The rookie detective panics. The senior detective observes a handgun on the kitchen table in an adjacent room. In an effort to manipulate the scene to reflect circumstances that appear to justify the shooting, the senior detective moves the handgun from the kitchen table to the sofa next to the drug-dealer's hand.

[28] This scenario is partially adapted from the primetime television show *Shades of Blue*, pilot episode.

If this scenario occurred in Texas,[29] pursuant to the construction of "alter" established by *Burks*, *Carnley*, and *Ramos*, the senior detective would be subject to prosecution for tampering with evidence. The interpretation suggested by Appellant — that the term "alter" means "to change, make different, [or] modify" by making some "change in the thing itself, its physical state or some part or detail"[30] — is too restrictive and frustrates the ends of justice. Prosecuting the senior detective for altering the crime scene by changing the physical location of the handgun would be consistent with what the Legislature intended: preserving the integrity and reliability of the justice system. Similarly, prosecuting Appellant for throwing evidence away from the scene of a major accident to avoid detection preserves the integrity and reliability of the justice system. This Court should affirm — preferably in a

[29] *See also State v. Wilson*, 2012-Ohio-3098, 2012 Ohio App. LEXIS 2725 at paragraphs 41-43 (Ohio Ct. App., Montgomery County 2012)(tampering conviction was not "unreasonable or against the manifest weight of the evidence" where the appellant moved items in the home and moved the victim's clothing to make it appear as though there had been a home invasion and sexual assault); *State v. Brodbeck*, 2008-Ohio-6961, 2008 Ohio App. LEXIS 5788 at paragraphs 50-52 (Ohio Ct. App., Franklin County 2008)("…given that the evidence established that [the] appellant dragged [the victim's] body and repositioned the gun near her hand in an apparent effort to simulate a suicide, the jury could have reasonably inferred that [the] appellant altered the crime scene with purpose to impair law enforcement efforts to investigate the shooting."). Additionally, changing the location of evidence from a "conventional" to an "unconventional" location may constitute tampering. *See Commonwealth v. Henderson*, 85 S.W.3d 618, 620 (Ky. 2002)("We must however make a cautionary statement regarding placement of evidence in conventional versus unconventional locations. The type of evidence and the place where it is hidden is relevant. Whether the evidence is hidden during a police chase is also relevant. A conventional place may become an unconventional place if the police are chasing the suspect when the evidence is hidden…[concealment of stolen money in a shoe]…while being pursued by police might convert a somewhat conventional location into an unconventional one sufficient to support a tampering conviction.").

[30] Appellant's Reply to State's Motion For Rehearing and Motion for En Banc Reconsideration at 8-9.

published case — the construction of the term "alter" employed by *Burks*, *Carnley*, and *Ramos*, reverse the Court of Appeals' decision, and affirm the Trial Court's judgment of conviction.

d) The evidence that Appellant physically changed the pill bottle's location was overwhelming and undisputed.

There is no dispute that Appellant changed the location of the evidence. Appellant's case is more compelling than *Burks* and *Ramos*, where the Courts were not able to rely on eyewitness testimony. Those Courts were left to determine whether inferences that the change in location of the bodies was due to the defendants' actions were reasonable.

Here, multiple witnesses observed the Appellant exit his vehicle, walk toward a high game fence, take the pill bottle out of his pocket and throw it over the fence into a patch of shrubbery (IX R.R. 119-121, 134-135, 169-170). These witnesses informed law enforcement they had seen Appellant throw the bottle over the fence, and officers recovered it on the ground after gaining access to the area (*id*. at 143-144, 180). During closing argument, Appellant's counsel admitted, "we know, I believe, that Ballard and Freeman see [Appellant] throw the pill bottle" (XI R.R. 24; *see also id*. at 30-31). The defense never attempted to argue that Appellant did not physically move the pill bottle (*id*. at 25).

Just as dragging a dead body from one location to another is an obvious attempt to hinder any investigation and subsequent prosecution, throwing a pill bottle of illegally-possessed drugs over a fence is an affirmative act that not only rids oneself of possession, but severs the links[31] between the offender's possession of narcotics and the significance of the offender's possession to the investigation of a major motor vehicle accident. The location and position of a piece of evidence are essential in understanding what crime, if any, has been committed and – as in this case – what offenses need to be investigated. Appellant's changing the bottle's location and position constituted an 'alteration' under the tampering statute.

2. In view of the legislative purpose, plain language, precedent, and policy of Section 37.09, the Court of Appeals erred in holding evidence is not "concealed" if it remains in plain view of bystanders.

Summary of the Argument

Evidence is "concealed" when it is removed, even if only temporarily, from the sight or notice of law enforcement investigating potential criminal activity. The Court of Appeals analyzed whether Appellant "concealed" the pill bottle relying

[31] *See, e.g., Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006) (under the affirmative "links" rule, "[m]ere presence at the location where drugs are found is thus insufficient, by itself, to establish actual care, custody, or control of those drugs. However, *presence* or *proximity*, when combined with other evidence, either direct or circumstantial (e.g., 'links'), may well be sufficient to establish that element beyond a reasonable doubt")(emphasis added).

primarily on the reasoning in *Thornton v. State*[32] and *Villarreal v. State*.[33] However, the Court of Appeals overlooked important factual distinctions between those cases and the instant case. The Court of Appeals erroneously limited the meaning of the term "conceal" in the tampering with evidence statute, contrary to legislative intent.

a) The word "conceal" in the context of Section 37.09 means concealment from law enforcement investigating potential criminal activity.

To avoid unnecessary repetition, the same arguments related to the policy and plain language of the statute mentioned *supra* (at 5-8) apply equally to the construction of the term 'conceal' in the context of the entire tampering statute. In *Wilson v. State*, this Court observed, "the purpose of section 37.09 is to maintain the honesty, integrity, and reliability of the justice system."[34] The Court of Appeals' interpretation that 'an item cannot be concealed if *anyone* else observes it' is inconsistent with the context of the word "conceals" in the statute.[35] When read in context, § 37.09 states that a person commits an offense if "knowing that an investigation or official proceeding is pending or in progress," he "conceals" a thing

[32] 401 S.W.3d 395, 398 (Tex. App. – Amarillo 2013), *rev'd on other grounds*, 425 S.W.3d 289 (Tex. Crim. App. 2014).
[33] No. 13-15-00014-CR, 2016 Tex. App. LEXIS 13061 at *5 (Tex. App.—Corpus Christi Dec. 8, 2016, no pet.)(mem. op., not designated for publication).
[34] *Wilson*, 311 S.W.3d at 460.
[35] *See* Tex. Gov't Code § 311.011(a); § 311.021(2); § 311.023(1); *Ritz*, 533 S.W.3d at 311 (Keller, P.J., and Walker, J., dissenting)("A statute should be read as a whole in determining the meaning of particular provisions….").

"with intent to impair" its availability for or affect the course of "the investigation or official proceeding."[36] The context of the word in the statute demonstrates that the ultimate 'concealment' concern relates to law enforcement investigating potential criminal activity.

b) Courts have found that evidence is "concealed" when it is removed from the sight or notice of law enforcement, even if only temporarily.

In the context of 37.09, the term "conceal" has been held to mean "the act of removing from sight or notice; hiding."[37] Conceal also means to "hide or keep from observation, discovery, or understanding," or "to prevent disclosure or recognition of or to place out of sight."[38] Whether the actor's efforts to conceal evidence are "ultimately successful matters little."[39] Regardless of whether the item is ultimately discovered or the tampering conduct occurs in the presence of law enforcement, the critical inquiry appears to be whether the evidence is 'concealed,' even if only temporarily, from law enforcement.

[36] Tex. Penal Code. § 37.09.
[37] *Rotenberry v. State*, 245 S.W.3d 583, 589 (Tex. App.—Fort Worth 2007, pet. ref'd).
[38] *Hollingsworth v. State*, 15 S.W.3d 586, 595 (Tex. App.—Austin 2000, no pet.); *Young v. State*, No. 07-09-0229-CV, 2010 Tex. App. LEXIS 9459 at *4 (Tex. App.—Amarillo 2010, no pet.)(not designated for publication).
[39] *Gaitan v. State*, 393 S.W.3d 400, 402 (Tex. App.—Amarillo 2012, pet. ref'd).

In *Hines v. State*, the court observed that Merriam-Webster's Collegiate Dictionary:

> provides two definitions for "conceal": (1) "to prevent disclosure or recognition of" and (2) "to place out of sight." Under the first definition, invisibility is not a prerequisite. A thing can be concealed merely by making it unrecognizable or unnoticeable. Under either definition, however, a dispositive inquiry is ***whether law enforcement noticed the object before the defendant tried to hide it and maintained visual contact.*** [40]

When an individual hides evidence "from view before police *notice* it," he has concealed evidence within the meaning of the statute.[41] Removing the evidence from the sight or notice of law enforcement "called to investigate" constitutes concealment.[42] This is true even when an officer sees the affirmative *act* of tampering, yet the evidence itself is removed from sight, notice, or observation.[43]

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[40] 535 S.W.3d 102, 110 (Tex. App.—Eastland 2017, pet. ref'd)(emphasis added).

[41] *Id*. at 111-12.

[42] *Gaitan*, 393 S.W.3d 400 at 402 (The court noted that whether appellant's "effort was ultimately unsuccessful matter[ed] little" and upheld the appellant's conviction because he was "'hiding' what he had *from the officers called to investigate*.")(emphasis added); *Stuart v. State*, No. 03-15-00536-CR, 2017 Tex. App. LEXIS 5165, at *10 (Tex. App.—Austin June 7, 2017, no pet.) (not designated for publication)(The evidence was sufficient to support a tampering conviction "because police were unable to see the knives until they lifted the box covering them.").

[43] *Hernandez v. State*, No. 13-14-00486-CR, 2016 Tex. App. LEXIS 6874 at *1 (Tex. App.—Corpus Christi June 30, 2016, no pet.)(not designated for publication)(upholding tampering conviction where "[the officer] observed [the] appellant attempting to hide something, and was thereafter able to locate the items when he shined his flashlight in the area where he observed [the] appellant make the furtive gesture. Rather than exposing the evidence to [the officer], [the] appellant *acted to remove the items from sight*.")(emphasis added); *State v. Lujan*, No. 07-09-0036-CR, 2009 Tex. App. LEXIS 7121 at *6-7 (Tex. App.—Amarillo, 2009, no pet.)(not designated for publication)(observing that conceal means "to prevent disclosure, recognition of, or to place out of sight," and "to hide or keep from observation, discovery, or understanding or to keep secret," thus the appellant's action of throwing a crack pipe into a grassy field as an officer approached constituted concealment).

Further, even if evidence is removed from the sight, notice, or observation of an investigating officer only *temporarily*, the evidence has been concealed.[44]

c) The Court of Appeals misapplied *Thornton* and *Villarreal* and erroneously distinguished *Munsch* and *Lujan* in the instant case.

i. Thornton *and* Villarreal *are distinguishable from the instant case.*

In *Thornton*, officers approached two people walking in the street when there was an adjacent sidewalk.[45] Officer Roberts observed the appellant "reach inside a pocket and drop an object."[46] The officer testified that the object "never left his sight."[47] After securing the two individuals, Officer Roberts walked to "the location of the dropped object where he retrieved a broken glass crack pipe and a brillo pad."[48] The court noted that the appellant "did not throw it, bury it, cover it, hide it, place it out of sight, or otherwise affirmatively attempt to conceal it;" he "merely

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[44] *Evanoff v. State*, Nos. 11-09-00317-CR, 11-09-00318-CR, 2011 Tex. App. LEXIS 2814 at *10 (Tex. App.—Eastland Apr. 14, 2011, pet. ref'd)(not designated for publication)(the appellant 'concealed' evidence when he grabbed baggies of narcotics off the trunk of vehicle and threw them on the ground, "removing the cocaine for a period of time from [the officer's] observation"); *Rodriguez v. State*, No. 13-15-00287-CR, 2016 Tex. App. LEXIS 6871 at *12-14 (Tex. App.—Corpus Christi June 30, 2016, no pet.)(not designated for publication)(appellant concealed evidence by turning away from officers, trying to hide his hands, switching evidence from one hand to the other, and refusing to open his hand when directed to do so); *Tooker v. State*, No. 03-17-00348-CR, 2017 Tex. App. LEXIS 10094 at *18-20 (Tex. App.—Austin Oct. 27, 2017, no pet.)(not designated for publication)(evidence sufficient to support tampering conviction where appellant tossed a baggie of methamphetamine on the ground during a traffic stop while officer was not looking).

[45] *Thornton*, 401 S.W.3d at 397.

[46] *Id*.

[47] *Id*. at 399.

[48] *Id*. at 397.

dispossessed himself of it, leaving it in plain-view."[49] The court found that where "at least one of the ***officers*** on the scene…***was aware*** *of the presence of the item* alleged to have been concealed ***at all times***" that knowledge was imputed to both officers.[50] Because the item was not removed from the sight or notice of *law enforcement*, the court held the evidence was insufficient to support the appellant's conviction for tampering.[51]

In *Villarreal*, the appellant stole a pair of shorts from Wal-mart.[52] A loss prevention officer identified the appellant and notified a law enforcement officer of the theft.[53] The loss prevention officer, "who was investigating Villarreal for shoplifting," observed the appellant run through the parking lot, remove a pill bottle from his pocket, and toss it underneath a car.[54] The law enforcement officer testified that he also "'observed [Villarreal] reaching into his shorts' pocket and then [he] observed a throwing motion'" that occurred "'between parked vehicles.'"[55] The loss prevention officer retrieved the bottle and gave it to the law enforcement officer.[56] Because the item was not hidden, removed from sight or notice, or kept from

[49] *Id*. at 399-400.
[50] *Id*. at 400 (emphasis added) (relying on *Hollingsworth v. State*, 15 S.W.3d 586, 595 (Tex. App.—Austin 2000, no pet.)).
[51] *See id*.
[52] 2016 Tex. App. LEXIS 13061 at *1.
[53] *Id*.
[54] *Id*. at *1, *7.
[55] *Id*. at *2-3.
[56] *Id*.

discovery or observation, the court of appeals found there was insufficient evidence to support the appellant's conviction for tampering.[57]

Both *Thornton* and *Villarreal* are distinguishable from the instant case. Prior to the arrival of law enforcement, Appellant walked 8-10 feet from a crime scene, removed a bottle of illegally-possessed narcotics from his pocket, threw them 10-15 feet across a fence line into shrubbery,[58] and got angry when bystander witnesses got close to that area. In *Thornton* and *Villarreal*, the evidence the appellants sought to conceal was visible to the 'officers' investigating criminal conduct at all times. Unlike the appellants in *Thornton* and *Villarreal*, Appellant did not commit the offense in the presence of someone investigating potential criminal activity. Unlike the appellants in *Thornton* and *Villarreal*, instead of knowing where to look due to first-hand observation of the tampering act, law enforcement officers had to be directed to the evidence when they later arrived on the scene. Because *Thornton* and *Villarreal* are distinguishable, the Court of Appeals erred in holding they control the outcome of the instant case.

[57] *Id*. at *5-6.

[58] The court of appeals held the pill bottle was not concealed despite the fact that it was thrown into a patch of shrubbery. *Compare with Turner v. State*, No. 03-18-00266-CR, 2018 Tex. App. LEXIS 4425 at *9-10 (Tex. App.—Austin June 19, 2018, no pet.)(not designated for publication)(evidence thrown out the window during pursuit and located lying atop "freshly mown" grass on the side of the road was "concealed").

ii. The Court of Appeals erred in distinguishing Munsch *and* Lujan.

In *Munsch v. State*, the appellant was a passenger in a vehicle stopped for speeding. [59] Upon making contact with the appellant and the driver, the officer noticed the driver exhibited signs of intoxication, and the appellant was raised up in his seat, as if he were putting something in his pocket.[60] The appellant "turned away" from the officer when the officer saw him.[61] This "raised [the officer's] suspicion that [the appellant] was 'trying to conceal something.'"[62] Following a search of the appellant, various items of drug paraphernalia and a small baggie of methamphetamine were located on his person.[63]

The appellant was arrested for possession.[64] The driver of the vehicle was arrested for unrelated charges.[65] In the patrol vehicle, the driver informed the officer that she was afraid of the appellant, he had told her not to pull over, and prior to stopping the vehicle, the appellant threw 18 grams of methamphetamine out the window.[66] The driver and the officer returned to the scene and the driver further described that the appellant threw the bag "ten or fifteen feet" from his passenger

[59] No. 02-12-00028-CR, 2014 Tex. App. LEXIS 9306 at *1 (Tex. App.—Fort Worth Aug. 21, 2014, no pet.)(not designated for publication).
[60] *Id*. at *2.
[61] *Id*.
[62] *Id*.
[63] *Id*. at *2-3.
[64] *Id*. at *4-5.
[65] *Id*. at *4.
[66] *Id*. at *5.

window.[67] Upon return to the vehicle, the officer located a large baggie of methamphetamine "in a 90-degree angle from the road."[68] The *Munsch* court held that the appellant "did in fact conceal the methamphetamine from [the original investigating officer] and other officers during the traffic stop."[69] If the driver had "not volunteered the information….[the officer] may have never returned to locate it."[70] *Id*.

The Court of Appeals in *Stahmann* noted that the officer in *Munsch* would not have found the evidence without the driver's information and the officer had difficulty locating the evidence in the darkness.[71] The Court of Appeals attempted to distinguish *Munsch* based on the premise that "nothing in [the instant] case indicat[es] that the officers would not have found the pill bottle had Ballard and Freeman not alerted them to it."[72] The Court of Appeals noted the testimony "unanimously established the pill bottle was plainly visible from the accident site" and "was not difficult to locate in the afternoon daylight."[73] Effectively, the Court of Appeals claimed that the evidence demonstrates the officers may have found the

[67] *Id*. at *6.
[68] *Id*.
[69] *Id*. at *19.
[70] *Id*.
[71] *Stahmann v. State*, 548 S.W.3d 46, 56 (Tex. App.—Corpus Christi 2018, pet. granted).
[72] *Id*.
[73] *Id*.

pill bottle without the third-party witness information. However, there is no evidence to support that conclusion.

Appellant walked 8-10 feet away from the crime scene, threw the pill bottle over a game fence and into a patch of shrubbery, where it landed approximately 10-15 feet from the fence line. Regardless of the time of day, the appellant in *Munsch* would have successfully completely concealed the evidence (barring any use in subsequent investigation or prosecution) by his acts if the third-party witness had not been forthcoming. Further, in *Munsch* there was at least an indication to the officer that "raised [his] suspicion" that the appellant may have been concealing evidence during the traffic stop. This would have given law enforcement an inkling to suspect they should search the area leading up to and around the traffic stop. In the instant case, the tampering and efforts to keep witnesses away from the evidence all occurred *before* law enforcement even *arrived*. As in *Munsch*, law enforcement would have had no idea that the tampering took place without information from the third-party witness(es). Considering the state of the evidence, the Court of Appeals erred in distinguishing *Munsch*.

In *Lujan*, the Amarillo court of appeals held the evidence was sufficient to show the appellant tampered with evidence when he threw a crack pipe away from him.[74] Around 5:00 P.M., an officer observed Lujan and another individual riding

[74] No. 07-09-0036-CR, 2009 Tex. App. LEXIS 7121 at *6-7 (Tex. App.—Amarillo, 2009, no

their bikes in an area where drug activity occurs.[75] As the officer approached Lujan, Lujan "took his right hand from his left side and moved it toward center 'as if he was throwing something.'"[76] When the officer made contact with the men, he saw a red, metal crack pipe on the ground in the area towards where Lujan made the throwing motion.[77] Even though the crack pipe was intact and visible, the evidence was sufficient to show Lujan concealed the evidence based on Lujan's conduct in throwing the pipe away.[78]

The Court of Appeals 'disagreed' with *Lujan* based on the premise that *Lujan* "implies that concealment may be established by mere evidence of the defendant's intent."[79] *Lujan* did not reach the conclusion of which the Court of Appeals complains. The *Lujan* court stated that "to be criminal, the *conduct* need not *result* in the destruction or loss of the evidence; rather, the accused need only act with the intent to impair its verify or availability as evidence."[80] *Lujan* is consistent with the body of law stating whether an actor's efforts are ultimately successful is not dispositive.[81] *Lujan* held that the conduct (or *actus reus*), *i.e.*, throwing the crack

pet.)(not designated for publication).
[75] *Id*. at *1.
[76] *Id*. at *2.
[77] *Id*.
[78] *Id*.
[79] *Stahmann*, 548 S.W.3d at 57.
[80] *Lujan*, 2009 Tex. App. LEXIS 7121 at *6 (emphasis added).
[81] *See Gaitan*, 393 S.W.3d at 401; *Stuart*, 2017 Tex. App. LEXIS at *9-10 (rejecting appellant's claim that he had not "concealed" a knife because law enforcement ultimately located the item and distinguishing *Rabb*, 483 S.W.3d 16 (Tex. Crim. App. 2016) , and *Thornton* because in those cases

pipe constituted "concealment" because that affirmative act was intended to keep the evidence from discovery.[82] *Lujan* did not do away with the requirement that an affirmative act be committed. *Lujan* did not conflate the *actus reus* with the *mens rea* of tampering. *Lujan* simply reiterated that the actor's intent coupled with the affirmative act constituted tampering and reinforced that the act of concealment need not be successful. Notably, prosecutions for tampering by concealment would rarely occur if the concealment *were* completely successful. The court of appeals erred in misinterpreting *Lujan*.

"the defendants failed to conceal anything because police officers saw the items before the defendants began trying to hide them) ; *Rotenberry*, 245 S.W.3d at 588-89; *see also Work v. State*, No. 03-18-002440-CR, 2018 Tex. App. LEXIS 3683 at *21-22 (Tex. App.—Austin May 24, 2018, no pet. h.)(not designated for publication)(evidence was sufficient to support conviction for tampering with evidence even though the narcotics were located in a coffee cup during a traffic stop); *Gordwin v. State*, Nos. 01-14-00343-CR, 01-14-00344-CR, 2015 Tex. App. LEXIS 4407, at *8-9 (Tex. App.—Houston [1st Dist.] Apr. 30, 2015,)(not designated for publication)(rejecting claim that because police ***retrieved a baggie of cocaine from toilet*** and it was not altered or destroyed the evidence was insufficient to support conviction for tampering, and noting "the jury was not required to find that [the defendant] altered or destroyed the cocaine ***found*** in the single, 'small baggie' recovered from the toilet…***the jury could have found that he 'conceal[ed]' the cocaine***")(emphasis added); *State v. Reuschling*, 2007-Ohio-6726, 2007 Ohio App. LEXIS 5895 at paragraphs 63-69 (Ohio Ct. App., Ashtabula County 2007)("the fact that [the defendant] placed the contraband in his mouth, when viewed in a light most favorable to the prosecution, is consistent with 'concealing' the item from law enforcement. The fact that [the defendant's] concealment efforts were ultimately unsuccessful is irrelevant for the purpose of this analysis. The state presented sufficient evidence to support a conviction for tampering with evidence.").

[82] *See Ramirez v. State*, No. 11-11-00077-CR, 2013 Tex. App. LEXIS 1106 at *8-9 (Tex. App.—Eastland Feb. 7, 2013, pet. ref'd)(not designated for publication)("concealment as used in the context of Section 37.09 is the affirmative act of doing something with an item of evidence with the intent of making that item unavailable in a subsequent investigation"); *see also People v. Eaglesgrave*, 108 A.D.3d 434, 434-35 (N.Y. App. Div. 2013), *leave to appeal denied*,("The offense of tampering does not require the actual suppression of physical evidence, but only that a defendant perform an act of concealment while intending to suppress the evidence…once an act of concealment is completed with the requisite mens rea, the offense of tampering has been committed.")

d) From a policy standpoint, the Court of Appeals' holding—that evidence is not concealed if a bystander can see the item—creates a host of unnecessary complications.

Moreover, the Court of Appeals' interpretation would lead to absurd results. Following the Court of Appeals' logic, if an offender threw a pill bottle over a fence and only his 'drug-dealer passenger' had observed him, concealment would not have occurred because the offender's criminal associate observed him concealing the pill bottle. An offender could not be convicted based on 'concealing' evidence if he removes narcotics from his girlfriend's person and tosses them on the ground, because his girlfriend observed the narcotics the entire time.[83] Finally, an offender could conceal evidence in the presence of a reluctant witness, and even if that witness later notifies investigative authorities, the offender could not be prosecuted for tampering.[84]

According to the Court of Appeals, if a third party can see the item that has been tampered with, the evidence is insufficient to prove the item has been

[83] *But see Tooker*, 2017 Tex. App. LEXIS 10094 at *18-20 (upholding appellant's conviction for tampering based on these facts).

[84] *But see Munsch*, 2014 Tex. App. LEXIS 9306 at *19-20 (where appellant threw narcotics out the window during traffic stop, turned away from officers while rummaging in his pocket, and driver subsequently notified officers that appellant threw the drugs out the window, the appellant "did in fact conceal the methamphetamine from…officers during the traffic stop. Had [the driver] not volunteered the information that [the appellant] had thrown the methamphetamine out of the window [the officer] may never have returned to locate it."). A tampering prosecution for evidence concealed in the presence of a third party would often turn on whether the third party informs investigative authorities of the location of the evidence, otherwise the State would never know of the concealment.

concealed. The Court of Appeals does not distinguish between a co-conspirator 'bystander' who conspired in initial criminal activity but not the tampering, a co-conspirator who conspired in the tampering, or an innocent third-party bystander who 1) never reports it to law enforcement, 2) reports it after a significant delay, or 3) reports it immediately.

The Court of Appeals effectively holds that evidence is not 'concealed' if *anyone* observes the item, regardless of whether that person reports it. If an offender conceals evidence in the presence of someone who is unlikely to report the concealment to law enforcement, the offender will likely never be prosecuted for tampering. However, following the Court of Appeals' reasoning, if the offender conceals evidence in the presence of someone who does report the concealment to law enforcement, the offender can only ever successfully be prosecuted for 'attempted' tampering.

Additionally, the Court of Appeals does not establish whether there is a time continuum that applies in determining when an offender's conduct becomes 'concealment' for the purposes of a tampering prosecution. An appellant can conceal evidence for a moment, even if the effort is ultimately unsuccessful.[85]

[85] *See, e.g.*, *Rodriguez*, 2016 Tex. App. LEXIS 6871 at *13-14 (appellant 'concealed' evidence momentarily from officers in his hands) (citing *Gaitan*, 393 S.W.3d at 402).

In the instant case, witnesses did not instantly convey to arriving officers that Appellant had concealed evidence.[86] Following the Court of Appeals' reasoning, would concealment depend on *when* a witness informs law enforcement of the presence of evidence? The Court of Appeals indicates no concealment occurs where witnesses inform law enforcement of the presence of evidence during their investigation of the scene, but what if several hours or two years passed before witnesses came forward? Would concealment depend on how drastically the absence of the evidence due to concealment impaired the investigation itself?

This would plainly be inconsistent with the "object sought to be attained" by the statute.[87] Common sense counsels that the 'concealing' the statute seeks to prevent is from law enforcement investigating potential criminal activity.[88] Because the plain meaning of concealment in the context of the statute – and as construed in case law – is concealment from law enforcement investigating potential criminal activity, Appellant concealed the evidence under sec. 37.09 of the Penal Code. It is well settled that the act of concealment need not be ultimately successful. Notably, although the jury charge included instructions for both tampering and attempted

[86] *See* IX R.R. at 136-37, 189-90.
[87] Tex. Gov't Code § 311.023(1) & (5); *see also id*. § 311.021(2) & (3).
[88] *See cf. State v. Barry*, 145 Ohio St. 3d 354, 356, 362 (S. Ct. OH 2015) (in a tampering case in which 'concealment' was not contested, the court characterized the appellant's act of placing a condom of heroin in her body as 'concealing' it, despite the fact that her co-conspirators were present).

tampering, the jury in the instant case convicted Appellant of tampering.[89]

Appellant removed and threw illegally possessed narcotics away from his person and the location of a major motor vehicle accident with the intent that the evidence remain undiscovered by law enforcement.[90] That Appellant was ultimately unsuccessful in concealing the evidence from officers because they eventually learned of and located the bottle is not dispositive. Law enforcement did not, as in *Thornton* and *Villarreal*, have notice of or maintain visual contact of the evidence *before* Appellant threw it over the fence. Without the assistance of civilians directing officers to the location of the pill bottle, the existence and significance of the evidence to the investigation would have been completely overlooked. The change in location and proximity was significant.[91] A pill bottle located between 10-15 feet[92] across a fence line would have little or no significance or link to the accident, without the witnesses' identification of the item as evidence.

Until the witnesses informed Koepp of the pill bottle, it remained concealed within the meaning of the statute because Appellant made it "unnoticeable." Thus,

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[89] *See Stahmann*, 548 S.W.3d at 53.

[90] Ballard, one of the first witnesses to arrive at the scene of the accident, observed Appellant remove a pill bottle from his right pocket, walk towards the fence, and throw it over the fence (IX R.R. at 121, 134). Ballard called 911 to request assistance (IX R.R. at 115). Notably, Ballard did not discuss the pill bottle being thrown during the call to 911 because the act had not taken place yet (*id*. at 143). It was during the time when witnesses were arriving and law enforcement was called to respond that Appellant threw the pill bottle over the fence (IX R.R. at 134).

[91] *See, e.g.*, *Evans*, 202 S.W.3d at 162 (presence at the location where drugs are found combined with other evidence may be sufficient to establish affirmative links in narcotics possession case)

[92] IX R.R.at 122; *id*. at 308 (described as 3-5 yards).

because the Court of Appeals misapplied the reasoning of *Thornton* and reached a conclusion inconsistent with an existing body of law and the plain meaning and contextual construction of the statute as a whole, this Court should reverse the published Court of Appeals case and affirm the Trial Court's Judgment of Conviction.

PRAYER

Wherefore, premises considered, the State respectfully prays that this Honorable Court reverse the Thirteenth Court's holding that the evidence is insufficient to support a conviction for Tampering with Evidence and affirm Appellant's conviction. Alternatively, the State prays for summary remand to the Court of Appeals to reconsider the case – either with the same panel or *en banc* – in light of *Burks* and case law regarding altering evidence by changing its location. The State also prays for all other relief to which it may be entitled.

Respectfully submitted,

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Certificate of Service

I, Jacqueline Hagan Doyer, attorney for the State of Texas, Appellee, hereby certify that a true and correct copy of this *State's Brief on the Merits* has been delivered to Appellant KARL DEAN STAHMANN's attorney of record in this matter, along with the State Prosecuting Attorney's office:

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Certificate of Compliance

I hereby certify, pursuant to Rule 9.4 of the Texas Rules of Appellate Procedure that the instant brief is computer-generated using Microsoft Word and said computer program has identified that there are 8,100 words within the portions of this brief required to be counted by the Texas Rules of Appellate Procedure.

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/s/ Jacqueline Hagan Doyer
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